IV. PROCEDURE FOR APPOINTMENT OF A GUARDIAN

A. *Petition and Hearing*

Appointment of a guardian on grounds of incompetence includes the following steps:

- A relative, public official, or other interested person files a petition stating why a guardian is needed and nominating someone to be the guardian. The petition should indicate what kind of guardian is needed, and what rights and powers should be retained by the person.

- A physician or psychologist must furnish a written statement concerning the person's mental condition, based on examination. Again, the evaluator should be asked to consider what rights the person may be able to retain. In addition, if the person (or anyone else) requests, he or she has the right to ask the court to order an independent evaluation. If the person cannot pay for the evaluation, the county must pay for it.

- The court appoints a "guardian ad litem," who is an attorney whose job is to interview the person, inform the person of his or her rights, investigate the case, report to the court on the need for legal counsel or additional evaluation, and represent the best interests of the person.

- If the person requests, or the court decides that justice requires it, the person has a right to an attorney to argue his or her side of the case. If the person is cannot pay the lawyer, the fees must be paid by the county.
- A hearing is held by the court. The person must be present, unless the guardian ad litem certifies that the person is unable to attend based on specific reasons. If the person's inability to attend is related to his or her disability, the court has an obligation to provide reasonable accommodations, for example by moving the hearing to a place that is accessible to the individual. If the hearing is contested, witnesses will be called to testify on the person's competence and may be cross-examined.

- If there is clear and convincing evidence that the person is incompetent, the court will appoint a guardian.

B. *Choice of Guardian*

In choosing a person to act as guardian, the court is required to make a determination of the best interests of the person in need of a guardian. The court must consider the opinions of the person and of his or her family. Ordinarily, if a parent is suitable and willing to be a guardian, and the person does not object, then the parent will be appointed (both parents can also be appointed as co-guardians). A parent may also nominate a person by will to be appointed as guardian after the death of the parent. Finally, a person who is competent to do so can nominate, in the form of a will, someone to be appointed guardian if he or she later becomes incompetent. The court may also appoint a standby guardian, to take over if the original guardian dies or is otherwise unable to serve. The standby guardian must notify the court when he or she takes over guardianship, but a separate hearing is not required.

The guardian should be someone who is, or is willing to become, familiar with the person's needs and situation and who will keep in frequent contact with the person. It is possible to split guardianship, appointing as guardian of the person a relative or friend familiar with the person's needs, and as guardian of the estate a person skilled in financial management.

Under Wisconsin law, a nonprofit corporation may also act as guardian, but only if no suitable individual guardian is available. The corporation must be approved by the state Department of Health and Family Services. Where there is a serious lack of individual guardians, organizations of family members or friends may want to consider offering corporate guardianship.

C. *Temporary Guardianship*

If a judge finds that there is an immediate need for a guardian for a person who has no permanent guardian, he or she may appoint a temporary guardian for up to 60 days, based on the petition alone, without prior notice to the person affected and without a hearing. The petition must be supported by a report from a physician or psychologist. The person must be notified of the petition for a temporary guardianship and of any court order for temporary guardianship, and has the right to an attorney and to a hearing to reconsider or change the guardianship. The temporary guardianship may be extended only once for an additional 60 days.

A temporary guardian may only perform duties specifically listed in the court order. Temporary guardianship may be useful where there is an urgent need for guardianship and there is not time to go through regular guardianship proceedings or the person is only temporarily incompetent. Unfortunately, repeated temporary guardianships are sometimes used to obtain legal consents for people who really are in need of permanent guardians. This practice deprives the person of his or her right to a full guardianship hearing, and of a guardian with a long-term interest in and knowledge of his or her circumstances and needs.

D. *Costs of Guardianship*

An attorney will usually be needed to prepare a petition for guardianship. It is probably best to call more than one attorney to ask about experience with guardianship and fees before hiring someone. Fees vary, and will be higher if the guardianship is contested. There may also be costs for medical or psychological evaluations.

Sometimes there may be no family member or other concerned person who is willing or able to pay the cost of bringing a petition. Many counties bring petitions for guardianship, but great variation exists among counties in the kinds of cases where the county will bring the petition. Where a prospective guardian requests help, some counties will charge the guardian for the costs of the petition, based on his or her ability to pay.

Counties are most likely to bring guardianship petitions where there is a need for a guardianship as part of an order for protective placement or services, or where guardianship is needed to protect the person from abuse, neglect, or exploitation. Under those circumstances, the county can consider assistance with guardianship to itself be a protective service. A possible route where this fails is to file a grievance alleging that the absence of a guardian violates rights under sec. 51.61, Wis. Stats, (see Section VII-G).

The cost of the guardian ad litem and attorney (if any) for the proposed ward may be charged to the proposed ward, if he or she can afford to pay. If he or she cannot pay, the county must pay these costs.

E. *How Does a Guardianship End?*

A guardianship continues for the life of the person found incompetent, unless it is terminated by the court. The court should review the guardianship when the person reaches the age of 18 or marries, to see if the guardianship is still needed.

In some cases, a guardianship will only be needed while the person gains (or regains) the skills he or she needs to see to his or her own needs. The person, the guardian, or any interested person may at any time petition for a review to determine if the person is still incompetent. The person is entitled to a hearing on the petition, and to be represented by a lawyer. The court must appoint a lawyer if the person requests one, and if the person cannot pay for the lawyer, fees must be paid by the county of legal settlement. After the hearing, the court can continue or end the guardianship, or can change the guardianship, for example by creating a limited guardianship.

V. POWERS AND DUTIES OF A GUARDIAN OF THE PERSON

A. *Role of a Guardian of the Person*

Under Wisconsin law, a guardian of an adult has "custody" of the person. The exact meaning of "custody" is not defined. The powers and duties of guardians have been defined over time by statutes and case law, and there are still gaps. Use of the word "custody" should **not** be read to mean that a guardian of an adult has the powers and duties of the parent of a child.

The guardian does not have a legal duty to financially support the person with the guardian's resources. The guardian may take the person into his or her home, but is not required to do so. Instead, the statutory duties of a guardian of the person are to:

- Receive notices and act in all proceedings as an advocate of the person (except. that a guardian of the person who is not also the individual's financial guardian may not represent the person where his or her property is involved);

- Try to secure necessary care, services or appropriate protective placement for the person; and

- Report annually to the court on the condition of the ward, including where he or she lives, his or her health, any recommendations by the guardian, and a statement of whether or not the person is living in the least restrictive environment consistent with his or her needs. If the person is under protective placement, the guardian may use the county's protective placement report for this. This should only be done, however, if the guardian has independently looked at the person's situation and agrees with the report.

In making decisions on behalf of the person, the guardian is expected under the law **to act in the best interests of the person and to use the judgement and care which persons of prudence discretion and intelligence exercise in the management of their own affairs**. Put another way, the guardian should try to decide what a reasonable person would do in the situation of the person under guardianship. A guardian does not need special expertise, but does need basic common sense and a willingness to learn about the person's needs and rights, and sources of support and services.

The responsibility of a personal guardian should be seen as far more than arranging for food and a warm place to live. A guardian is responsible for seeking services that will help the person to reach or maintain his or her fullest potential, and that will allow the person to live and work in the least restrictive environment possible. The guardian is also responsible for assuring that the persons' rights and dignity as a person are defended. In order to fulfill this responsibility, a guardian of the person should:

- Learn about sources of funding and appropriate services for the person. A guardian is not responsible for providing care and services, but is responsible for knowing what is available to provide income, medical care, vocational services, etc., and for making sure that applications are filed and followed through.

- Know the circumstances and condition of the person. Knowing what supports and services are needed will mean consulting with the person, learning about the disability, and talking to professionals and others involved in the person's life. Guardians should try to attend all staffings, and should learn to ask questions and seek more than one opinion. Although the statute does not specify a level of contact, a good guideline is that the guardian should have some personal contact with the person at least every month, and a personal visit to the person at least every 3 months.

  If possible, it is useful to see the person in a variety of settings, such as the home, work or day program, at a restaurant, etc. A guardian who lives far away should arrange either to make visits or to find someone locally who can visit and report to the guardian.

- Act as an advocate for the person, not only in obtaining services but also in assuring that his or her rights are defended. This means that the guardian must learn about basic rights of people receiving services for mental or developmental disabilities and about specific rights for the person's residential setting or workplace. (See Section VII.)

- Assure that the person's freedom is not more restricted than it needs to be. The person has a legal right to the least restrictive living and service environment consistent with his or her needs. In addition, a good guardian will involve the person in all decisions and will try to give the person the opportunity to make choices of his or her own, so that the guardian exercises the least possible control, and so that the person has an opportunity to learn responsible decision-making and, hopefully, can gain greater independence. This may involve allowing the person to take some risks, but a good guardian must recognize his or her responsibility to help the person learn to be independent, as well as his or her responsibility to assure that the person has needed supports. (See next section for some way of measuring restrictiveness.)

- Remember that need for guardianship in many cases results from the fact that the person was never taught how to make choices and take responsibility. A good guardian will try to give the person these opportunities, and will seriously reevaluate whether the guardianship is still needed.

B. *What is the Balance Between the Guardian's Power to Protect and the Person's Constitutional Rights?*

A guardian gets his or her powers from the state. Guardianship is a creation of state laws and guardians are appointed by state courts. When a guardian exercises control over a person, he or she is acting for the state, and is subject to constitutional limits on the state's power to interfere in the lives of its citizens, as well as to state policy calling for the least possible restriction on exercise of constitutional rights. Fundamental constitutional rights are discussed in more detail in Section VII-B. Fundamental constitutional rights include the rights to life, liberty, freedom of speech and religion, freedom of association, privacy, access to government, and voting.

Where the person has an expressed wish in a fundamental area, it is arguably an abuse of the guardian's authority to ignore those wishes without a clear protective purpose for doing so. Some conflicts can be avoided by defining the guardian's powers at the outset through limited guardianship. (See Sections III and VII).

C. *What Factors Determine what is "Least Restrictive"?*

One responsibility of a guardian is to make sure that supports, services, placements and limits on rights are no more restrictive than necessary to achieve their purposes. Service systems often focus primarily on supervision and (hopefully) treatment. Guardians play an important role in ensuring that the person's typical human rights and needs are also considered. In evaluating whether a particular support, service or placement is the least restrictive, statutes, administrative rules and court cases have identified the following factors:

- Placement and services should, as much as possible, **integrate the person into the community** and promote relationships with a variety of people. Residential, recreational, work or program settings that separate the person from the community should be used only if it is not possible to provide the same supports justified by inability to provide needed support services in integrated settings.

- Placement and services should **place the least possible restriction on personal liberty and constitutional rights**. This factor relates to freedom of movement, discussed below, and also to other rights, such as freedom of association, freedom of religion, privacy rights, rights to hold property, and right to vote.

- Placement and services should as much as possible **allow the individual the same rights as other citizens**. If people are treated differently from other citizens, is there some compelling and unavoidable need for the difference?

- Placement and services should **least limit the person's freedom of choice**. This factor relates to the range of choices available and to the person's role in making those choices, and also to the extent that the person is helped to develop and use an effective communication system.

- Placement and services should be those that **least limit the person's mobility**. This factor relates not only to the use of physical restraints and locks, but also to programmatic restrictions on mobility, such as policies that limit freedom of movement and availability of opportunities and supports to be out and about in community settings.

- Placement and services must **minimize harm to the person's image and social standing**. Rightly or wrongly, placements in certain settings, particularly large institutions such as nursing homes and mental hospitals, cause other people to make negative assumptions about the people placed there. The principal of least restrictiveness tries to avoid this kind of harm.

- **Avoid discontinuity in personal relationships and living situation.** Not all change is bad, but loss of familiar places and people can be painful and confusing. Moves should be justified by benefit to the individual, rather than convenience of service providers.

Another way to look at least restrictiveness is the *principal of normalization*. Normalization means that in programs for people with disabilities, the goals that are established and the methods selected to meet those goals should reflect the life experiences that most community members desire for themselves. In other words, a service should be favored if it is the type that most people in society use to meet the same need: housing should be provided in a typical home or apartment; work should be done at a typical workplace, etc. Use of this test will promote integration and avoid choices which most of us would not accept for ourselves.

D. *Securing Appropriate Care and Services*

A guardian is not just someone who signs forms so that the person can get services and treatment that happen to be offered to the person. A guardian has a responsibility to act as an advocate for the person and to try to secure necessary care services, or appropriate protective placement for the person. Thus, the guardian must have a way to know what the person's needs are, and must try to assure that they are met. If an application for needed services is refused the guardian must evaluate whether the denial is justified or whether there should be a second request or an appeal of the denial. The guardian has full access to all of the files and records kept on the person, and cannot be denied information which is needed to check the accuracy of, or reasons for, agency decisions.

The guardian must try to get necessary and appropriate care, services, and placement, but is not ultimately responsible for providing a support or service if there is no program to provide it or if reasonable efforts fail to get the supports from programs that do exist. In deciding how hard to try and what strategies to use, a guardian again should ask him or herself what a reasonable person would do if he or she had the needs of the ward. This would vary according to the importance of the service involved and the likelihood of success. An application for funding for needed medical care should probably be worked on harder than a minor improvement in a vocational program. A guardian may decide that there is little chance of winning on an issue, and therefore that it is not reasonable to appeal a denial of services. A guardian may also decide that pushing too hard for an issue may create hostility from service providers and others important in the ward's life, and that this will do more harm than good.

The duty to try to obtain necessary and appropriate services goes beyond simply assuring adequate food, clothing, shelter and medical care. Services will be "appropriate" only if they also support the person to engage in rewarding activities and to be as independent and productive as possible, and to gain, maintain or regain skills and abilities that will

help the person be more independent. Whatever the person's level of ability, it is almost always possible to develop approaches to help the person to learn something more, or to provide stimulation and activities to help the person retain existing skills.

In recent years, there has been a shift in the philosophy of long-term care towards a "support" model. Under earlier ideas, people were often denied access to typical homes, communities and experiences until they had received "treatment" in segregated facilities that made them "ready." Unfortunately, the "treatment" often never resulted in the skills needed to meet the “readiness” test. Under a support model, the presumption is that a person should always be supported to live in his or her own community and to have normal life experiences of personal relationships, work, play, etc. This does not mean that habilitation or treatment services should not be provided, only that they should be provided in ways that also support the person to have a normal life.

Although the protective placement law requires a finding by a judge that the person's disability is permanent or likely to be permanent, this does not mean that the same level of care and residential treatment will always be appropriate. It is likely that the levels and types of protective services and placement will change many times during a person's life, as the person's needs and preferences change, or as the service system itself develops more effective ways to support people in less restrictive settings.

E. *Choosing Medical and Psychological Treatment*

1. Introduction

Personal guardians are often called on to give consent to medical, psychological or other treatment. Before a professional or agency may give a treatment, such as medication, surgery or behavioral treatment, to a person, the professional or agency must get the *informed consent* of the person. That is, the person must consent knowing the risks and benefits of the treatment, and the alternatives to the treatment. Where a person is incompetent, the guardian must act for the person by deciding what a "reasonable person" would do in his or her situation.

There are some decisions where courts have held that the guardian does not have the power to consent for a person who cannot consent for himself or herself, including a decision to donate an organ to another person or to be sterilized. These actions may not be possible for someone who cannot give informed consent.

2. What is an Informed Consent?

To give an informed consent to a treatment or service, a decision-maker should be provided with complete and accurate information about:

- The benefits of the treatment or service, and the likelihood that it will succeed;
- The way the treatment or service will be provided;
- The risk of side effects which are a reasonable possibility;
- Alternative treatments or services, and their likely results;
- What is likely to happen if the person does not get the treatment or service.

Unless there is an urgent need for immediate action, you as a decision-maker should be given the time you need to think

about what you were told, ask for more information, or seek information from someone else.

3. Customary Medical Treatment Decisions

Guardians have clear authority to consent to medical treatment that is for the person's benefit. The guardian's duty is not simply to consent to whatever is recommended: the guardian should give the same kind of careful thought that a reasonable person would give in consenting to care for himself or herself. The guardian should be sure to obtain the information needed to give an informed consent.

The amount of time a guardian will need to devote to a decision will depend to some extent on the nature of the procedure. Some medical decisions, such as the decision to follow a doctor's advice to have your appendix out, are reasonably straightforward: you can be pretty sure that you need the operation, that it will work, and that there are no other good choices. On the other hand, some decisions, such as whether to have surgery for a bad back, may be much harder: you can live with some back pain, an operation may not work, there are significant risks that you might be worse off, and there are alternative approaches, such as exercise, physical therapy, chiropractic services, acupuncture, etc., that might be worth trying first. Typically, you would want to take some time about this kind of decision, and to seek other opinions, perhaps from other kinds of professionals with other, less drastic approaches.

A guardian can play a very valuable role as historian: the guardian will often be the one constant person in medical decisions over time. A guardian should make an effort to learn the person's medical history and should tell the doctors if the ward is allergic to medications, or has a history of particular medical problems or complications.

4. Procedures that Only Benefit Others

Sometimes, a person may be asked to undergo a medical procedure to benefit other people. Where the procedure involves risk, is irreversible, and does not clearly benefit the individual, a guardian in Wisconsin probably lacks authority to consent for the person. For example, in one Wisconsin case a guardian asked the court to approve consent on behalf of the ward to donate a kidney to the ward's sister, who had lost both kidneys. The ward in that case was not able to indicate whether he wanted the operation. The state Supreme Court held that the guardian could not consent because the operation did not serve any interest of the ward. While a "reasonable person" might have consented in the ward's situation, the court refused to allow either the guardian or a judge to use his or her "substituted judgement'" to decide what the ward would have done if he had been competent. A different case might be presented if the ward had been able to indicate a strong attachment to his sister, a desire to help her and some understanding of the operation.

Another example of a procedure for the benefit of others is an experimental procedure that would increase medical knowledge but does not have any substantial chance of helping the individual patient. Again a guardian in Wisconsin probably lacks authority to consent for the ward. The statutes governing treatment facilities and agencies for people with mental disabilities specifically require informed consent from both the guardian and the ward to any experimental procedure.

5. Treatment for Mental Disabilities; Behavior Modification; “Drastic” Procedures

Except where the treatment is necessary to prevent serious physical harm to the person or others, the written, informed consent of the guardian of the person must be obtained for treatment and services that are needed due to the mental illness, developmental disabilities, or alcoholism or other drug abuse of a person who is under guardianship. Treatment and services can include: psychoactive medications, such as tranquilizers and antidepressants; behavioral treatment programs; psychotherapy; drug treatment programs; etc. The informed consent of the guardian is necessary regardless of whether the person is under an order for protective placement or commitment.

In looking at these programs, guardians should make sure that the person is provided with a positive environment and

activities, and that negative or restrictive programs, such as those using restraint or seclusion, are used only in an emergency or for genuine treatment purposes, and then only when the provider has clearly shown that other more positive methods will not work. (See Section Vii-G). Some settings, such as nursing homes and community-based residential facilities, have strict restrictions on use of restraints. The Bureau of Quality Assurance or the Board on Aging and Long Term Care can provide current guidelines. If a program has gone on for a long time with no change in the person, a guardian should question whether it is useful to continue the program, whether another approach should be looked at, or whether other things about the person's environment and activities should be changed.

The state's bill of rights for people in treatment facilities and agencies for people with mental disabilities specifically requires informed consent from **both** the guardian **and** the person before any experimental or drastic procedure may be used. "Drastic" procedures include psychosurgery and electroconvulsive treatment. However, the courts have found that an exception exists where the person is unable to consent, there is a threat to the person's life, and the proposed treatment is a life-saving remedy.

While the guardian has authority to consent to psychoactive medications, the guardian does not have authority to use or authorize use of force to administer medications or treatment over the person's objections. A court may authorize use of force as part of a commitment order, if it finds that the person is not competent to refuse the medication or treatment. (See Section V-H-5.)

If the person has a chronic mental illness, a court may issue a protective service order authorizing a guardian to consent to forcible administration of psychotropic medication on an outpatient basis, and authorizing law enforcement personnel to take the person in to the outpatient setting to receive the medication. These orders must meet strict criteria, including that the person have a chronic mental illness that is likely to respond to the medication, that there be a substantial probability of physical harm to the person or others, that the person be at demonstrated risk of commitment, and that protective services be provided under a treatment plan.

6. Decisions to Withhold Life-Prolonging Treatment

One of the most difficult decisions a guardian may face is whether to authorize major surgery or painful therapies where the person's long-term chances for recovery are poor. The Wisconsin Supreme Court has defined a guardian's authority in only a few situations. Some states have held that a judge or guardian may use "substituted judgement" and decide what the person would decide if he or she were competent. The Wisconsin Supreme Court has not adopted this approach, and has required that the guardian make a decision based on the best interests of the person. The court's decisions have been narrowly focused on particular cases, but do provide some basis for guidance:

- A guardian does not have authority to refuse treatment to prolong life based on a decision that the person's life is less worthwhile than a non-disabled person's life. For example, if a person who is mentally retarded has a heart condition requiring surgery, it would be improper to deny the surgery because of a feeling that the person's quality of life was low due to his or her mental retardation. In other words, if the treatment would be given to a non-disabled person under the same circumstances, it should also be given to the disabled person. (Some states have made a limited exception to this to allow the court or guardian to consider whether the disability makes the treatment itself more painful or inhumane because the person's inability to understand what is happening and cooperate.)

- Where the person's wishes as to what he or she would want to be done in a particular situation are known, it is in the person's best interests to follow his or her wishes. However, there must be evidence of a clear statement of what he or she would want under the circumstances; general philosophical comments will not be enough. This "clear statement" might be a power of attorney for health care, living will or other written statement that the ward made while competent, or even oral statements if specific enough and reliably and credibly reported by other individuals.

- A guardian must begin from a presumption that it is in the best interests of the person to continue to live. This

presumption can be overcome only in very limited circumstances where life expectancy and prognosis do not justify the pain, loss of dignity and dependence associated with the treatment, for example where a painful treatment will only prolong the process of dying for a short period, and would never allow the person to recover enough to be even temporarily free of the treatment.

- Feeding tubes are considered treatment, and the guardian may respect a person's clear statement that he or she would want them withdrawn under particular circumstances. The guardian may authorize withdrawal from a person who has not made a clear statement of his or her wishes only if the person is confirmed to be in a chronic vegetative state, and the guardian determines that withdrawal would be in the person's best interests. The guardian must first give notice to all interested persons including family members and the health care facility staff. If the individual is in any condition other than a persistent vegetative state, the guardian may authorize the removal of feeding tubes if the guardian can demonstrate "by a clear preponderance of the evidence a clear statement of [the ward's] desires in these circumstances."

- Given the uncertainty of the law, a guardian should seek court approval of a decision to withhold life-prolonging treatment in any situation where he or she has doubt about his or her authority.

7. Sterilization, Birth Control and Abortion

The Wisconsin Supreme Court has held that under Wisconsin law neither a guardian nor a judge may consent to sterilization for a person who cannot give an informed consent for himself or herself. The court noted the following special features about sterilization:

- People have a constitutional right to be free of unwarranted state interference into decisions involving reproduction.

- Sterilization is irreversible.

- Other means of contraception are generally available for the individuals involved.

- Those providing substituted consent might be influenced to authorize sterilization by their interest in convenience and relief from responsibility rather than by the best interests of the person.

- Wisconsin has no statute governing sterilization of people unable to consent, and courts should not deal with the issue without legislative standards.

Where a person wants to be sterilized, one possible approach is to seek a limited guardianship so that the person retains the right to consent to the operation. It may be helpful for the person to have counseling on the issue, so that the decision is independent and the counselor can provide evidence that the person understands the nature, risks and benefits of sterilization.

The court does not question the guardian's authority to consent to other birth control methods, and this is the best solution for many people. If a guardian feels that sterilization is essential and the person cannot consent, he or she should first seek court approval. The court might reach a different decision in a situation where other forms of birth control could not be used and there was a significant health risk if pregnancy occurred. The court's limitations on a guardian's authority should not apply when an operation is necessary because of a significant danger to the person's life or health not connected with pregnancy. For example, if a ward has cancer of the uterus, a guardian could consent to an operation to remove the cancer even though it results in sterilization. The court's limitations also should not apply where the person can understand the risks and benefits of the operation and give informed consent. In that case, the court can be asked to limit the guardianship to allow the person to consent for himself or herself.

The Wisconsin appeals courts have not dealt with a guardian's power to consent to (or refuse) an abortion for a ward. As with sterilization, courts have found that a woman has a constitutional right to make decisions on abortion without state interference. Again, a court could limit the guardianship to allow the woman herself to make the decision where she is competent to do so. If a woman is not able to consent, and the guardian feels an abortion is in her best interests, the guardian should seek court authorization to consent to an abortion. Even if she is not fully competent, a woman's expressed preference should carry great weight in deciding what is in her best interests.

F. *Making Residential Placements for Care, Treatment or Supervision*

A person continues to have a constitutional right to freedom of movement even though he or she has been found in need of guardianship. (See Section VII-B-3.) Implementing this right should include involving the person as much as possible in deciding where to live, and protecting the person's right to live in the least restrictive conditions under which needed care, treatment and supervision can be provided. Because of the importance of this right, any placement to a community residential facility that a person protests, and any long-term placement to a more restrictive facility such as a nursing home or institution, must be reviewed and ordered by a court to assure that it is really necessary and that a less restrictive placement is not possible. (If the person has signed a health care power of attorney, this may give a health care agent further authority to make placements to residential facilities and nursing homes without a court order. This authority cannot be used if the person has a developmental disability or mental illness.)

The authority of a guardian to act without a court order has been spelled out in the state's protective placement law. As long as the person does not object, the guardian can consent to admission to a foster home or a community-based residential facility (such as a group home or halfway house) that has fewer than 16 beds. A guardian may only consent if the placement is in the least restrictive environment, and must review the placement each year. A guardian may also consent to admission of the person to a nursing home if the person is admitted directly from a hospital for a recovery period of up to 3 months. (This cannot be done if the hospital admission was for psychiatric care.)

If a person admitted to a community residence or for short-term nursing home care objects in any way, either in words or by other actions (for example, by trying to leave physically), the facility has an obligation to inform the county protective services agency, which must investigate as soon as possible (within 72 hours at most.) If the protest continues, the placement must either be ended or a protective placement order must be obtained from a court.

G. *Admitting the Person for Psychiatric Hospital Care*

Although there are state statutes that allow a guardian to make short-term admissions to a psychiatric hospital, the Wisconsin Supreme Court has held that a guardian does not have authority on his or her own to authorize admission of the person for inpatient psychiatric treatment in a hospital. The person can be voluntarily admitted only if both the guardian **and** the person give consent.

The statutes provide that if a person refuses or is unable to consent but does not actively object to admission, he or she can be admitted for up to seven days as a "voluntary" patient, if the physician certifies that the person has been informed of the benefits and risks of treatment, of his or her right to request release, and of his or her right to the least restrictive form of treatment appropriate to his or her needs. A court must be notified, a guardian ad litem must be appointed, and there must be a court hearing after 7 days.

In other situations, particularly where the person objects to the admission, a civil commitment must be ordered by a court to require involuntary psychiatric treatment. (See Section V-H-5.) If there is an emergency that involves a substantial risk of physical harm to the person or other people, a law enforcement officer may take the person to a hospital, which can admit the person without consent for up to 72 hours. The person can be held pending a commitment hearing a court finds probable cause that the person meets commitment standards.

H. *Court-Ordered Services and Placement*

1. The Protective Service System

Chapter 55 of the Wisconsin Statutes establishes a protective service system designed to prevent abuse, neglect and exploitation of people with long-term mental disabilities, while at the same time trying to ensure that as far as possible they keep the same rights as other people. The statute requires each county to designate an agency to plan the local protective service system.

The protective service and protective placement laws are intended to protect people with developmental disabilities, chronic mental illness, mental and physical disabilities caused by advanced age, and similar disabilities, if the disability substantially impairs the person's ability to meet their basic needs. Anyone who has a guardian based on a finding of incompetence should be eligible for protective services. Depending upon the individual, protective services or placement can mean everything from some counseling or arranging for help with homemaking to placement in a residential facility or institution against the person's will.

In an effort to prevent exploitation or abuse of old and disabled people while at the same time making sure that the "protectors" did not go overboard in their protective efforts, the law requires that the protection be provided in a way which places **the least possible restrictions on personal liberty and exercise of constitutional rights**. Although the system allows for involuntary placement in residential settings, the statute requires that the system encourage independent living and avoid protective placement whenever possible. If a protective placement is ordered, it must be to the least restrictive environment consistent with the person's needs.

Under the law, services to the person in his or her home should be used to avoid protective placement whenever possible. The law prefers that protective services be provided at the request of the individual or, at least with the voluntary cooperation of that person. A guardian can authorize services for a person who cannot consent, provided that the person does not resist the services.

Protective services can only be provided to a person against his or her will in those situations where there first has been a court finding under the guardianship laws that a person is mentally incompetent and secondly that there has been a court finding that the person will incur a substantial risk of physical harm or deterioration if the services are not provided. A county protective service agency can provide involuntary service on an emergency basis, without specific court order, when it appears that the person entitled to the services or others will incur substantial risk of serious physical harm. Emergency services may not be provided for more than 72 hours. For involuntary services after that point there must be a court finding of probable cause that the person meets standards for a protective service order.

The law requires a court finding of incompetence under the guardianship law before protective services or placement can be ordered. If the court finds that the person is competent to make his or her own decisions, services cannot be forced on the person, even though he or she is choosing to lead a life that seems "strange" or different from the way other people want him or her to live, and even though he or she might really benefit from the services. (If a competent person is at risk of harm and needs treatment, he or she may be subject to a commitment. See V-H-5.)

If the court finds that the person is mentally incompetent to make those decisions and also that some form of protective services is needed, the next step is to evaluate what the person's needs for protection are and then order only those services which place the least possible restrictions on the person's freedom and lifestyle. An example of this would be that of a moderately mentally retarded adult who has quite a few of the skills necessary to live in the community (e.g., can meet his self-care needs and get around the community safely) but still lacks skills in preparing a menu, cooking a meal, and handling large amounts of money. Since a combination of protective services, such as home-delivered meals, a temporary representative payee, counseling and training in money management and education in menu planning would

be a way of meeting all this person needs, the law should not authorize a residential placement which would take more personal freedom away than is necessary.

2. Protective Placement

As discussed in Section V-F, a guardian can only consent to placement for a person where the placement is in a foster home or group home, or is temporary, and where the person does not object. Except in situations governed by a health care power of attorney, a court order for guardianship and protective placement is required for long-term placement of an incompetent person in an institution or nursing home, even if the person does not make any objection. Court review and continuing oversight is provided to ensure that placement of a person who cannot consent is meeting the person's needs and is not more restrictive than absolutely necessary.

A court can order protective placement only if it finds that:

- The person has been found to be mentally incompetent under the guardianship laws (often, the guardianship and protective placement processes are combined);
- The person has a disability which is permanent, or likely to be permanent;
- As a result of the disability, the person is so totally incapable of providing for his own care or custody as to create a substantial risk of serious harm to the person or others. Serious harm may be proved by either showing what the person does or what the person fails to do; and
- The person has a primary need for residential care and custody, that is, the person's needs could not be met through services alone or through short-term treatment.

The person is entitled to notice of the hearing and to appointment of a **guardian ad litem**, who is an attorney who interviews the person and informs the person of his or her rights, investigates his or her needs and circumstances, and makes an independent report both as to what rights the person and guardian want to exercise, and also as to the guardian ad litem's own recommendations concerning procedural rights and appropriate placement. The guardian ad litem should always talk to the guardian of the person where one has been appointed, to find out the guardian's position on the placement and to find out if the guardian recommends that the person have an independent evaluation or an independent attorney. The guardian ad litem's responsibility throughout the process is to make sure the person's rights are respected and to advocate for the person's best interests. The guardian ad litem need not take direction either from the person or from the guardian of the person concerning what will be in the person's best interests.

If the person asks for one, or contests the need for or nature of the proposed placement, he or she has a right to an attorney to represent his or her point of view. This attorney is sometimes called **adversary counsel**. The county is required to pay the attorney's fees of the adversary counsel if the person is indigent. The adversary counsel is supposed to represent the person and his or her legal rights, and, like the guardian ad litem, need not take direction from the guardian if he or she feels that the guardian's goals are contrary to the person's rights. However, in many cases adversary counsel will listen to and follow guardian recommendations, particularly if the person and the guardian are in agreement, or the person has limited ability to communicate.

After receiving a petition for protective placement, the court must order a **comprehensive evaluation** of the person. Usually, the county protective service agency is responsible for carrying out or coordinating the evaluation. The evaluation should cover all aspects of the person's support and treatment needs and service history, and should make a recommendation for least restrictive placement, if placement is recommended. The comprehensive evaluation is an important part of the process, and the guardian should identify the person preparing the report to ensure that he or she is aware of the person's needs, preferences and history. If the report is inaccurate or incomplete, the guardian can request

that the court order further evaluation.

The person also has a right to an **independent evaluation** as to any issue involved in a protective placement case, including need for placement and what kind of placement and services should be ordered. The guardian ad litem is responsible for finding out if the person or guardian wants an independent evaluation, and for informing the court of any request. If the person cannot afford to pay for an evaluation that is ordered by the court, the county protective service agency must pay for it. If the guardian believes independent evaluation is needed, he or she can ask the guardian ad litem to recommend it, or can write to the court directly. It is usually a good idea for the written request to identify by name an evaluator who knows the issues the guardian wants addressed, and to contact that person to make sure he or she is willing to do the evaluation has needed information.

In practice, a major weakness in protective placement hearings is the lack of specific evaluation of the person's needs and what type of program could meet those needs. For example, it is not uncommon to find a recommendation that says that a person "needs" a nursing home, with no explanation of what specific support services the person needs and why those support services cannot be delivered in a community setting. A guardian often knows the person and his or her history well, and can play an important role in assuring that evaluations look at the individual needs of the person and how those can be met in the least restrictive way.

Some hearings on protective placement are short, while others can be long and complicated. The person and guardian must get notice of the hearing, and the person is supposed to be present if that is possible. The hearing can be held where the person is placed if that is necessary. The person should not be excluded from the hearing just because being there would be unpleasant or stressful. The guardian also has a right to be present and to participate as a party. There is usually an opportunity for the guardian to state his or her views, if the guardian requests. Often, the guardian will be able to work closely with the guardian ad litem and/or the adversary counsel to make sure evidence is presented. However, the guardian has a right to an attorney of his or her own, and has a right to present evidence and ask questions of witnesses.

If the judge decides after the hearing that protective placement is needed, he or she will order the responsible county protective service agency to make the placement. The judge can make specific orders about where the person may be placed and what kind of services he or she must receive. The placement must be both consistent with the person's needs for support and treatment, and carry out the person's right to the least restrictive setting. (See Section V-C.) Placements are not limited to nursing homes and institutions: they can be made to the person's own home or apartment, to adult family homes, and to community-based residential facilities as well. The judge is not limited to specific placements that already exist: he can order the county to do planning and implementation to develop a needed placement. For example, a court can order the county to develop a plan to support the person in a home setting, and then to seek providers who are willing and able to provide the services.

A protective placement order **may not be used to place a person to an acute psychiatric unit** in a hospital. Such placement must either be voluntary (See Section V-G) or made through civil commitment procedures.

The county has primary responsibility for making sure that the placement continues to be appropriate to the person's needs and is least restrictive. If a **transfer of placement** is proposed, the person and the guardian must receive notice. If possible, the notice should be in advance. If the guardian, the individual, the individual's attorney or other interested person objects to the change in placement, then there must be another court hearing to determine if there is probable cause that the transfer will be in the person's best interests.

3. Protective Placement Reviews

Whenever the individual, guardian, attorney, or county agency is of the opinion that the reasons for continuing the protective services or placement no longer exists or that the person is entitled to a less restrictive or more appropriate

placement, they may file a petition with the court to get another hearing on this matter and to request that an attorney be appointed to represent the person.

The county protective service agency must submit a **written review** of the person's physical, mental and social condition at least every twelve months. (The Judge may order that they be conducted more frequently.) This should provide current information on the same issues as are covered in the comprehensive evaluation, including a review of whether the person needs placement and whether the current placement is consistent with his or her needs and is least restrictive. If the guardian has concerns about the placement, he or she should specifically request input into the report.

A 1985 Wisconsin Supreme Court decision held that the court making the placement must perform an active review of the placement at least every year. This annual review is called the **Watts review**, after one of the women involved in the original case. Every year, the court must appoint an attorney as guardian ad litem to meet with the person, review the annual report of the protective service agency and inform the person that he or she has a right to request an attorney, an independent evaluation and a full hearing on the appropriateness of his or her placement. The guardian ad litem can also request an independent evaluation and can look at other records and information about the person. He or she must then report to the court on whether protective placement is still needed, whether the current placement is the least restrictive consistent with the person's needs, and whether the individual or guardian is requesting a change in placement, appointment of an attorney, or a full hearing. The guardian ad litem must contact the guardian for his or her views on all of these issues, and this is a good opportunity for the guardian to have input to the court and to suggest other sources of information for the guardian ad litem.

The judge must review the report of the guardian ad litem and decide whether to order additional evaluation, whether to appoint an attorney for the person, and whether to hold a full hearing. A full hearing must be held whenever the person, the guardian or the guardian ad litem requests it, or whenever the guardian ad litem indicates that the placement is no longer needed or is not the least restrictive possible. Again, as discussed above, the guardian has a right to participate in the hearing as a party.

4. How Do Funding Issues Affect Protective Placement?

For people who do not have enough income and resources to pay for placement themselves, the county is responsible for paying the costs of protective placement. There is no separate state funding for this, and counties must use other human service funding or local tax dollars. The result has been a strong incentive for counties to place people in nursing homes and other institutions funded by Medical Assistance, even where this is more expensive and less appropriate, because this funding does not come out of the county's budget.

Prior to 1995, Wisconsin court's had held that courts and counties could not consider the source of funding in deciding what placement was most appropriate and least restrictive. However, in December, 1995, a new law went into effect which provides that rights to least restrictive and appropriate services are limited to what the county can achieve with available state and federal funds and required matching funds. This allows counties to argue that a more appropriate placement should not be ordered because implementing it would cost county dollars.

The new law does not apply to people who met the standards for protective placement before it went into effect. Where it does apply, it should be up to the county to show that there really are no state and federal funds that could be used for a needed placement. It may not be constitutional to limit the court's power to ensure that a placement is not overly restrictive, and there is also a good argument that unnecessary segregation violates the Americans with Disabilities Act. Where this is an issue, the guardian should consult an attorney for more advice.

5. Commitment

Under the civil commitment laws, a judge may involuntarily commit a person for treatment who is mentally ill, drug

dependent, or developmentally disabled, who is a proper subject for treatment, and whose actions present a substantial probability of physical harm to himself or herself or others. Commitment is generally used to provide psychiatric treatment or evaluation, either on an inpatient or outpatient basis, to a person who is resisting treatment or is unable to consent. The person alleged to need commitment has rights to an attorney, an independent evaluation and a full due process hearing. A mentally incompetent person should also have a guardian ad litem to represent his or her interests.

I. ***Checklist for Guardians of the Person***

1. Annually

   a. File a report with the court and with the county protective service agency [880.38(3)) (Check with county agency for reporting requirements.) The report must, at a minimum, include:

      (1) The location of the person.

      (2) The person's health condition - including major health events that occurred during the year such as surgery, strokes, changes in treatment, etc.

      (3) A statement of the least restrictive environment that the person could reasonably live in while receiving appropriate services or supervision on an in patient or outpatient basis.
      (4) A statement as to whether the person is currently living in the least restrictive environment.
      (5) A statement of all services which the person appears to need but is not receiving. A description of reasons why the person is not receiving services such as lack of money, denied admission, refuses to participate.

   b. Review the residential placement (if any) regarding adequacy and restrictiveness. Attend staffings for residential and day services.

   c. If there is a protective placement, review the county protective services report and make recommendations to the guardian ad litem and the court on whether an independent evaluation is needed, an attorney should be appointed, or a hearing held to review the placement.

2. Monthly

   a. Keep notes on personal visits with the disabled person:

      (1) How is the person's physical health?
      (2) Does he/she seem happy?
      (3) What special things have happened since your last visit?
      (4) Did he/she have a chance to let you know about any problems? Were there any?

   b. Keep a file of letters and notes of calls or meetings with others responsible for providing services.

   c. Keep a list of things that need to be done or questions that you want to ask:

      (1) What is the question, concern or suggestion?
      (2) Who do you need to write to or talk with?
      (3) What has been done by you or them since last month?

   d. Regularly ask to see the records that service providers keep about the person. This should provide a summary of what is happening and how the person is doing. By making this routine, you should avoid

any problems when you have a particular reason or concern that you want to check on.